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MELTON *v.* COMMONWEALTH.

March 16, 1922.

[111 S. E. 291.]

1. **Criminal Law (§ 889*)—Verdict Correcting Mistake in Penalty Held Invalid as Rendered after Discharge of Jury.**—Where the court told the jury after a verdict of guilty of rape that they were discharged, and the jurors thereupon returned to the jury room accompanied by the sheriff to claim attendance fees, but were thereafter recalled by the court upon discovery that the jury had made a mistake fixing the penalty under Code 1919, § 4414, and again retired and returned another verdict, such other verdict could not support a conviction, having been rendered after discharge.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 62.]

2. **Criminal Law (§ 889*)—Inadvertent Announcement of Discharge of Jury May Be Recalled Only if Jury Has Not Left Presence of Court.**—So long as the whole jury are in the actual and visible presence of the court, and under its control, an inadvertent announcement of their discharge may be recalled as a matter still in the breast of the court, but, after they have left the court's presence, their functions as jurors have ended, and they cannot, either with or without the consent of the court, amend or alter their verdict.

Prentis, J., dissenting.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 62.]

Error to Circuit Court, Campbell County.

Ernest Melton was convicted of rape, and he brings error. Reversed and remanded.

Duncan Drysdale and *L. Bradford Waters*, both of Lynchburg, for plaintiff in error.

John R. Saunders, Atty. Gen., *J. D. Hank, Jr.*, Asst. Atty. Gen., and *Leon M. Bazile*, Second Asst. Atty. Gen., for the Commonwealth.

MOTLEY *v.* H. VICELLO & BRO. et al.

March 16, 1922.

[111 S. E. 295.]

1. **Courts (§ 99 (1)*)—Decrees Establishing Lien Held Not Res Adjudicata of Validity Thereof on Petition for Rehearing by Other Lien Creditors.**—A decree annulling a deed of trust establishing a lien on the land and referring the cause to a commissioner to report

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liens thereon, with their priorities, etc., and a decree confirming the report and directing the sale of the land, were not *res adjudicata* of the validity of such lien as against other lien creditors on a petition for rehearing, on the ground that the *lis pendens* memorandum was invalid on its face, whether or not petitioners were parties to the proceeding when the decrees were entered, though there was no affidavit in support of the petition, and one of the decrees confirmed a commissioner's report, to which there was no exception at the time; the error being apparent from the record and the decrees merely interlocutory.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 348.]

2. *Lis Pendens* (§ 17*)—Description of Land in *Lis Pendens* Memorandum Held Insufficient.—While the maxim that that is certain which can be made certain is applicable to a description of land in a *lis pendens*, as well as a pleading or deed, a creditor's lien under Code 1904, § 2460, on property conveyed by a void deed of trust executed by the debtor, was invalid as against other lien creditors, where *lis pendens* memorandum misstated the surname of the grantor in the deed and described the land only by reference to that "mentioned" in the suit, the petition in which was not filed until afterward, and contained the same defects; the sufficiency of the description in the memorandum being tested as of the time it was left with the clerk to be recorded, from which time the lien dates.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 338.]

3. *Fraudulent Conveyances* (§ 324*)—Creditor's Lien, though Invalid as against Other Lien Creditors, May Be Enforced against Debtor from Surplus from Sale of Land after Satisfaction of Other Liens.—A creditor, whose lien on land conveyed to another by a void deed of trust executed by his debtor is invalid as against other lien creditors by reason of the insufficiency of the description of the land in his *pendens* memorandum, may nevertheless enforce his lien against the landowner from the surplus of the proceeds of the sale of the land after satisfaction of the other creditors' liens and payment of costs of suit.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 456.]

Appeal from Circuit Court, Pittsylvania County.

Suit by H. Vicello & Bro. and others against J. J. Motley. Decree for plaintiffs, and defendant appeals. Reversed in part and affirmed in part.

S. A. Anderson, of Richmond, and *Jas. L. Tredway*, of Chatham, for plaintiff in error.

Geo. T. Rison, and *William Smith*, both of Chatham, for defendants in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.